No. 2486

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY F. MARSHALL,

Appellant,

vs.

SAMUEL W. BACKUS, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

In the Matter of the Application of Henry F. Marshall for Writs of Habeas Corpus on Behalf of Thirty-five Hindus.

BRIEF FOR APPELLANT.

HENRY F. MARSHALL,
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By.....*Deputy Clerk.*

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BRIEF FOR APPELLANT.

This is a consolidated appeal from an order denying several petitions for writs of habeas corpus, the cases arising under the immigration law, and being brought here upon the record in one of the cases as typical of all.

History of the Cases.

The persons, on behalf of whom the writs were sought, are Hindu aliens. They had been duly and

regularly admitted to enter the United States by qualified officials administering the immigration law at the Port of Manila. Later they travelled to the continent, directly and without leaving the jurisdiction of the United States. Upon their arrival at San Francisco, they were arrested, and are now ordered deported to India, upon warrants, issued by the Secretary of Labor. The warrants charge that these persons are in the United States in violation of law, specifying that

> The said aliens are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States.

The Court below, in denying the petitions, based its decision (trans. p. 2), largely upon its judgment in a former similar case, In re Rhagat Singh, 209 Fed. 700. This former decision was appealed and is now under submission here under the title, "Healy v. Backus," No. 2436.

In deciding the case at bar the trial judge held substantially as follows:

(1) That an alien, duly admitted under the immigration laws at Manila, is admitted to the Philippine Islands only, and not to the United States at large.

(2) That aliens, arriving at continental ports from other parts of the United States, may be ex-

cluded from the mainland precisely as though coming direct from foreign territory.

(3) That there is no material distinction between the exclusion of an alien applying for original admission and the expulsion of an alien theretofore duly landed.

(4) That, because the aliens appear to have had a fair hearing, the Court may not examine into the merits, although the case is one of expulsion and not of exclusion.

Each of the matters so decided constitutes a radical departure from the interpretation and practice of immigration law, as the same has heretofore obtained. And each of these points is fully covered by the Assignments of Error set forth in the record.

Points Raised on This Appeal.

In former immigration appeals, as shown by the reported cases, the only question raised, and therefore the sole question decided, has related to the power of Congress to legislate along certain lines.

The present appeal differs materially from all others in this, that the question of the power of Congress to legislate is not raised at all. To the contrary, we shall discuss solely the extent to which Congress has exercised its power to legislate in immigration matters, and we shall ask this Court to determine authoritatively, just what powers have been granted to, and what withheld from, the execu-

tive officers. We ask Your Honors to say to the immigration officials, "Thus far shalt thou go and no farther".

The principles of immigration law which the appellant seeks to establish on this appeal are substantially as follows:

(1) That an alien, duly admitted to land at any port of entry, is thereby admitted, not to a limited territory, but to the entire United States; and may thereafter freely pass throughout the entire jurisdiction, unless expressly forbidden thereto by law.

(2) That, in the absence of fraud, the Secretary of Labor has no jurisdiction to review the decision of immigration officers in the Philippine Islands respecting the admissibility of an alien to enter the United States, whether such review be attempted directly or indirectly.

(3) That there is a substantial and material difference between cases of expulsion and of exclusion, not only as to the appropriate procedure and the persons amenable thereto, but also in the causes prescribed therefor and in the finality of the decisions reached by the officials.

(4) That the law does not clothe with any finality the decision of the Secretary of Labor in expulsion cases, and that, by reason thereof, it is within the power and is the duty of the federal courts to examine into the merits of such cases on habeas corpus.

(5) That, in the present cases, the warrants of deportation, issued by the Secretary of Labor, are void in that they do not state a cause for deportation under the immigration law.

Each of these contentions we will discuss in order.

I.

An Alien, Duly Admitted to Land at any Port of Entry, is Thereby Admitted, not to a Limited Territory, but to the Entire United States; and may Thereafter Freely Pass Throughout the Entire Jurisdiction, Unless Expressly Forbidden Thereto by Law.

The Acts of Congress, comprising the immigration laws of the United States, are general statutes. This will not be denied. Being general statutes, they are of general operation throughout the entire jurisdiction, unless specifically limited, and the term "United States", as used in the immigration laws includes the Philippines. Section 33 of the Immigration Act* reads as follows:

> Sec. 33. That for the purpose of this Act the term "United States" as used in the title as well as in the various sections of this Act shall be construed to mean the United States and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone: *Provided,* That if any alien shall leave the canal zone and attempt to

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* Where sections of the "Immigration Act" are cited reference is had to the "Act of February 20, 1907 (34 Stat. 898) as amended by Acts of March 26, 1910 (36 Stat. 263) and March 4, 1913.

> enter any other place under the jurisdiction of the United States, nothing contained in this Act shall be construed as permitting him to enter under any other conditions than those applicable to all aliens.

The law authorizes the appropriate immigration officers to examine aliens applying for admission to the United States, and to exclude or admit them —exclude them from or admit them to the "United States" as defined by the Act, and not to or from some limited portion thereof. The fact that the section quoted specifically excepts the Canal Zone from the United States and forbids the passage therefrom to other portions of the jurisdiction of aliens, except under conditions applicable to all aliens—this fact carries with it, by necessary implication, a provision that aliens from other portions of the jurisdiction *may* pass *exempt from such conditions.*

Our contention for the rule that aliens, once admitted to the United States, may freely pass from one portion of the jurisdiction to another, is greatly strengthened by the fact that the law provides a single exception thereto. The exception is found in Section 1 of the Immigration Act; and the President's proclamation pursuant thereto is quoted at length in Immigration Rule No. 11 (Immigration Laws and Rules, 4th ed., p. 27).

The exception refers to "laborers holding limited passports", that is, passports limited to some other country, or to the Canal Zone, or to the Insular

Possessions, who attempt to use such passports to enter the continental territory of the United States, from such other country or such Canal Zone, or from such insular possessions; and it is provided that such aliens shall not be admitted to the continent.

It follows by necessary implication that, if a certain class of admitted aliens are forbidden to pass from the insular possessions to the continent, all admitted aliens, not of the forbidden class, are permitted by the law to freely pass. And the persons on whose behalf the petitions were filed, not being of the forbidden class, may, under the law, come to the mainland, freely and without molestation by the immigration officials.

II.

The Secretary of Labor Has no Jurisdiction to Review the Decision of Immigration Officers in the Philippine Islands Respecting the Admissibility of an Alien to Enter the United States, Whether Such Review be Attempted Directly or Indirectly.

The administration of the immigration laws, as distinguished from their operation, is entrusted by Congress to two dictinct sets of executive officials, their respective jurisdiction depending upon the geographical location of the port of entry at which the alien applies for admission. And in each terri-

torial subdivision the jurisdiction of the appropriate officials is exclusive.

Section 22 of the Immigration Act* provides in part:

> "The Commissioner-General of Immigration * * * shall, under the direction of the Secretary of Labor, have charge of the administration of all laws relating to the immigration of aliens into the United States. * * * He shall establish such rules and regulations * * * and shall issue from time to time such instructions, *not inconsistent with law,* as he shall deem best calculated for carrying out the provisions of this Act and for protecting the United States and aliens migrating thereto * * *"

Section 6 of the Act of February 6, 1905† (33 Stat. 689) provides that

> "The immigration laws of the United States in force in the Philippine Islands shall be administered by the officers of the general government thereof designated by appropriate legislation of said government, and * * *"

Construing these statutes together, it is evident that Congress has entrusted the administration of the immigration laws of the United States, for the geographical subdivision of the United States, known as the Philippines, to a certain corps of officials; and that it has likewise entrusted such administration in all other portions of the country to another corps, viz., to the Secretary of Labor and the Commissioner-General and his subordinates.

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* See pamphlet Immigration Laws, page 13.

† Idem, page 52.

And in its respective geographical territory the jurisdiction of each set of officials is complete and exclusive, there being no provision of law whereby the acts of one are rendered reviewable by the other.

For many years, and until June, 1913, this territorial jurisdiction, absolute and exclusive, was recognized and respected by the Secretary of Labor and the Commissioner-General, not only passively but directly, since the pamphlet "Immigration Laws", published under authority of the Department of Labor in July, 1914, carries, on page 21, this:

> NOTE.—The act entitled "An act to regulate the immigration of aliens into the United States", approved February 20, 1907, is the immigration act or law referred to in the following (revised) rules. All numbered sections mentioned in the rules refer to those of said act unless stated to the contrary. These rules apply to aliens seeking admission to each and every portion of the United States *except the Philippine Islands, in which territory the immigration laws are administered by officers of the general government of those islands.*

And not only did the Secretary of Labor and Commissioner-General expressly disclaim jurisdiction of aliens arriving via the Philippines, but Rule 14, until its amendment as hereafter noted, provided that an alien who had been admitted to the United States at insular ports, upon producing a certificate of such admission, should be admitted to the mainland without further examination.

Upon June 16, 1913, however, Rule 14 was amended to read as shown below, the amended portions appearing in italics:

> Subdivision 1. EXAMINATION AT INSULAR PORTS. Aliens arriving in Porto Rico, Hawaii or the Philippines, bound for the continent shall be inspected and given a certificate, signed by the immigration officer in charge at San Juan or Honolulu, or the insular collector of customs at Manila, showing fact and date of landing.
>
> Subd. 2. CERTIFICATES FOR ALIEN INSULAR RESIDENTS. Aliens who, having been manifested *bona fide* to Porto Rico, Hawaii or the Philippines and having resided there for a time, signify to the immigration officer in charge at San Juan or Honolulu, or the insular collector of customs at Manila, an intention to go to the continent, shall be furnished such certificate, as evidence of their regular entry at an insular port.
>
> Subd. 3. ADMISSION AT CONTINENTAL PORTS OF ALIENS PRESENTING CERTIFICATES.—Aliens applying at continental ports and surrendering the certificate above described, shall, upon identification (and payment of head tax, if from Porto Rico or Hawaii) be permitted to land, *provided it appears that at the time such aliens were admitted to Porto Rico, Hawaii, or the Philippines they were not members of the excluded classes, or likely to become public charges if they proceeded thence to the mainland.*
>
> Subd. 4. ARREST AND DEPORTATION.—If such aliens fail to present the certificate, it shall be presumed that they were not examined when entering Porto Rico, or Hawaii, or the Philippines, and they shall be arrested in accordance with Rule 22 on the ground of entry without

> inspection and such other grounds, if any, as may be found to exist. *If it is found in accordance with subdivision 3 hereof that such aliens were at the time of entry to Porto Rico, Hawaii, or the Philippines, members of the excluded classes or likely to become public charges if they proceeded thence to the mainland, they shall be arrested in accordance with Rule 22 on either or both of those grounds.*

A comparison of the rule as amended with the rule as it stood before amendment, made in the light of the note above quoted, shows, conclusively, an attempt by the department officials to read into the law a construction that is not there, and to arrogate to themselves a jurisdiction and to exercise an authority, which has not been conferred by Congress and which they themselves, prior and up to that date, had specifically disclaimed.

As the claim to such jurisdiction and authority was first made by the amendment of June 16, 1913, citation of cases prior to that date would not be of assistance, and the matter has not been passed upon subsequently. The question, as it arises here is *sui generis* and entirely new, and must be passed upon as such by this Court.

It is true that Section 22 of the Act empowers the Commissioner-General to establish such rules as he may deem proper, but it expressly limits those rules to such as are "not inconsistent with law". The amendment objected to is inconsistent with law in the following particulars:

(1) It attempts a review of the action of immigration officers in the Philippines in admitting aliens to the United States, such review to be made when such alien may arrive at a continental port irrespective of the passage of time.

(2) It attempts to control the movement of aliens after admission, *by imposing a condition* upon their movement from one part of the United States (Manila) to another (San Francisco).

(3) It imposes upon the alien a burden not contemplated by law, in that it requires him to prove *in praesenti* that *at some past time* he was not likely to become a public charge.

(4) It requires the alien to prove that he was not likely to become a public charge *upon the happening of a contingency,* such contingent-conditional admission not being within the contemplation of the law.

(5) It attempts to shift the burden of proof in expulsion cases from the government to the alien.

For these reasons we believe that this Court must hold that Rule 14 is invalid as being in excess of the power to make rules, conferred upon the Commissioner-General by law.

Moreover, it having been decided by the immigration officers at Manila that these persons were *not* likely to become public charges, and the Secretary of Labor having no jurisdiction to re-examine, review or reverse such decision, that decision stands today, not as *res adjudicata,* but as the only existing de-

cision made with jurisdiction thereof. It follows that the recital to the contrary in the warrant is of no force and effect, but void for want of jurisdiction; and the warrant depending entirely thereon is likewise void.

III.

There is a Substantial and Material Difference Between the Exclusion of an Alien Applying for Original Admission and the Expulsion of an Alien Theretofore Duly Admitted.

The distinction, between the exclusion-and-shipment-back of an alien applying for original admission and the expulsion-upon-arrest of one theretofore admitted to enter the United States, is real and substantial, and clearly recognized by the immigration law. For example, Section 3 of the Act prohibits the landing of prostitutes and provides for the deportation (expulsion) of aliens practicing prostitution, pandering, and the like. Continuing, it provides punishment for aliens who attempt "to return to or to enter" the United States, after he has been "debarred or deported" for a violation of the section; clearly covering (1) an attempt to *enter* by one who has been *debarred* and (2) an attempt to *return* by one who has been deported.

So consistently does the Act recognize this distinction that the expressions "deport, deported and deportation" as used therein, refer exclusively to expulsion of aliens from within the country, with

three exceptions only. Standard dictionaries give two meanings to the word "deportation"; first, "expulsion, banishment", and second, "transportation". In the three exceptions noted the second meaning is used. They refer to the suspension of deportation of persons required as witnesses, physically unable to travel, or who are wife or child of a permanent resident. In all other instances the meaning "expulsion" is obvious from the context.

This distinction is recognized, also, in text books, digests and the Immigration Rules. Both the Federal digest and the Century, under the general title "Aliens", carry a sub-title "Exclusion or Expulsion". Mr. Bouve's work entitled, "Exclusion and Expulsion of Aliens" is customarily cited as an authority, while Immigration Rules 21 and 22 provide respectively for the "Deportation of Excluded Aliens", and the "Arrest and Deportation on Warrant" of aliens whom it is sought to expel.

This point was raised in the Court below and was formally conceded by the United States attorney, who also conceded, in so many words, that the present case is one of expulsion and not of exclusion.

In briefing the case, however, counsel, despite his concession, confused the causes, laid down in the law for exclusion, with those prescribed for expulsion. He also strenuously urged the application to expulsion cases of a rule obtaining only in exclusion cases, viz., "In exclusion cases the Court may not examine into the merits on habeas corpus,

since the law makes the decision of the immigration officers final, except upon appeal to the Secretary".

For these reasons it is important and necessary to briefly examine the distinction made by the law between the two classes of cases.

THE EXCLUSION OF APPLICANT ALIENS.

In exclusion cases the alien comes direct from foreign territory and is seeking original admission. He may have been here before, but that does not affect his status, it being determined by the fact that he comes from without the United States. Such persons, in the diction of the Immigration Service, are termed "applicant aliens" and their cases "applicant cases".

Upon arrival at a port of entry the alien is examined by an Immigrant Inspector to determine whether or not he is a member of the excluded classes (Section 2 of the Act) such as idiots, insane, felons, anarchists, prostitutes, etc., and persons likely to become public charges. This is termed "primary inspection".

Upon primary inspection the inspector either lands the alien or, if he does not appear "clearly and beyond a doubt entitled to land", he is detained for hearing before a Board of Special Inquiry. Even if the first inspector passes him, the decision may be challenged by another inspector, and this also serves to take the alien before the Board (Section 24).

The Board of Special Inquiry consists of three inspectors, who sit as a trial Court. It holds hearings in private, keeps a permanent record of proceedings and testimony, has authority to admit or debar the alien, and the decision of two members prevails, except an appeal be taken, by the alien or the dissenting inspector, to the Secretary of Labor. If the Board's decision is adverse to the admission of the alien, such decision is final, subject only to an appeal to the Secretary (Section 25).

The appeal to the Secretary is allowed the alien in all except certain specified cases. It is taken upon a transcript of the permanent record, which is forwarded to Washington through official channels, accompanied by written comment on the case by the immigration officer in charge. A brief may also be filed on the alien's behalf. Nothing beyond this record may be considered upon the appeal, and upon it the Secretary examines and decides the case —either affirming the decision of the Board or sustaining the appeal.

The Court will note that the procedure in these exclusion cases corresponds very closely to the criminal procedure of the courts in this State in felony cases. The alien has a preliminary hearing before a single inspector (committing magistrate); he has a hearing before the Board of Special Inquiry (trial in the Superior Court); and he has an appeal to the Secretary from the decision of the Board (appeal from the judgment of the Superior Court). And, as the judgment of conviction in the

Superior Court is final unless reversed on appeal, so also the decision of the Board is made final by law, subject only to the appeal to the Secretary. So that, taken all in all, the rights of the alien in exclusion cases are reasonably well safeguarded.

The provision of law, making final the adverse decision of the Board, is found in the same section of the Act with, and follows, the provisions of law prescribing the powers and duties of Boards of Special Inquiry (Section 25). It reads as follows:

> *Provided,* That in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Labor.

The Court will note the limitations which are placed on the doctrine of the "Finality of Decisions" of immigration officers. Such decisions are final only as follows:

(1) When the case is one where an alien is *excluded from admission into* the United States;

(2) Where the decision is that of the *appropriate* immigration officers;

(3) When the decision is *adverse to the alien,* and

(4) When the decision is not reversed upon appeal to the Secretary.

Evidently, the finality of decision being limited to cases where an alien is "excluded from admission

into'' the United States, that doctrine does not attach to the case at bar where it is sought to ''expel from within'' an alien theretofore admitted.

Furthermore, the ''appropriate'' officers, whose decision is made final, are those composing the Board of Special Inquiry, and none others. This appears conclusively (a) from a reading together of the entire section, and (b) from the fact that the law does not provide for an appeal to the Secretary from any decision except that of a Board of Special Inquiry. And such Board sits in exclusion cases only, and has no function whatever, as we shall hereafter show, in expulsion cases such as this. So that the provision of the law may be accurately paraphrased as follows:

> ''In exclusion cases the decision of the Board of Special Inquiry, if adverse to the admission of the alien, shall be final, unless reversed upon appeal to the Secretary.''

In construing the provision of law above quoted, the Courts have gone very far indeed in upholding the immigration officers, acting within their jurisdiction, and in affirming the finality of their decisions upon questions of fact in exclusion cases. The following are the leading decisions, and all are exclusion (not expulsion) cases.

Ekiu v. United States, 142 U. S. 651;
Lem Moon Sing v. U. S., 158 U. S. 538;
United States v. Jew Toy, 198 U. S. 253;
Chin Yow v. United States, 208 U. S. 8;

Tan Tung v. Edsell, 223 U. S. 673;
Ex parte Lee Kow, 161 Fed. 592;
United States v. Williams, 190 Fed. 897.

These cases have formulated, modified, affirmed and approved a rule, which is correctly stated as follows:

> In exclusion cases, the decisions of questions of fact by the appropriate immigration officers, acting within their jurisdiction, is final, subject to an appeal to the Secretary, and the courts will not enquire into the merits where it appears that the alien has been accorded a fair hearing and there is some evidence to support the decision.

The lengths to which the Courts have gone in upholding this rule is well illustrated by the Jew Toy case, *supra.* In this case a Chinese person coming from abroad was ordered excluded. On habeas corpus the District Court determined that Jew Toy was an American citizen by birth and therefore not within the purview of the immigration laws. Upon appeal, however, the Court held that the question of citizenship was one of fact, upon which in exclusion cases the decision of the immigration officers was final, subject to an appeal to the Secretary. The opinion was by a majority of the Court, but the alien (sic) was deported. The cases of Chin Yow and Tan Tung, *supra,* involved the same question of citizenship.

In view of the almost arbitrary power invested in the immigration officers by the statute and the rule of interpretation above quoted, we believe and

urge that its application be confined to the class of cases specified by the statute, and that the attempt here made to extend its application to expulsion cases be definitely forbidden by this Court.

> The immigration law is drastic and deals arbitrarily with human liberty and should be strictly construed.
>
> Redfern v. Halpert, 108 C. C. A. 262.

EXPULSION OF ALIENS FORMERLY ADMITTED.

Expulsion cases differ from those of exclusion in every important particular. *Ex vi termini,* they deal with persons already within the country, and involve the right to remain and not the right to enter.

Proceedings in these cases (Rule 22) start with an "Application for a Warrant of Arrest" (trans. p. 28). This is made to the Secretary of Labor and may be made by any person, but in practice is usually made by some immigration officer. Upon this application, a "Warrant of Arrest" issues (trans. p. 29) and the alien is taken into custody. A hearing follows; it is presumed to be before the Secretary but in practice the evidence is taken by some one detailed for that purpose. A written record of the proceedings and evidence produced is forwarded to Washington, and upon that naked, written record (and such briefs as may be filed) the Secretary of Labor, and he alone, determines the case, issues his Warrant of Deportation (trans. p. 26) or cancels the warrant of arrest. There is

no decision by any immigration officer, and obviously there is no appeal to the Secretary from his own decision.

The law has not affirmatively provided for any appeal or review, and if this cannot be had by habeas corpus, under general provisions and principles of law, there is no relief. If the rule as to finality of decisions, applicable to exclusion cases, is to be extended to cover the decision of the Secretary in expulsion cases, then the destiny of tens of thousands of foreign-born residents, whether naturalized citizens or not, is to depend wholly upon the arbitrary action of one man. This is a power greater than that wielded by the infamous and hated Third Section of the Russian Secret Police, a centralization of power absolutely inconsistent with the principles of this government, and renders the validity of the judgments (of naturalization) of our Courts dependent wholly upon the will of an executive officer.

We urge that this Court confine the application of the rule to exclusion cases, as provided by statute, and adjudge in unmistakable language the different status of decisions by the Secretary in expulsion matters.

IV.

The Law Not Having Rendered Final the Decision of the Secretary of Labor in Expulsion Matters, it is Within the Power and Duty of the Federal Courts to Examine Into the Merits on Habeas Corpus.

That the statute does not, affirmatively, make final the decision of the Secretary in expulsion cases, aside from the foregoing demonstration, is upheld by the legal maxim, "Expressio unius est exclusio alterius". The law, having made final the decision of one set of officials (Board of Special Inquiry) thereby refuses to make final the decision of another official (the Secretary).

Moreover, the United States Circuit Court of Appeals for the Seventh Circuit, on March 14, 1911, decided this very question in favor of our contention, in the case of Redfern v. Halpert (108 C. C. A. 262). That was an expulsion case and the Court, in its opinion, adopted the language of the trial judge who said:

> "I find nothing in the law making the decision of the Secretary of Commerce and Labor final, and I am satisfied I have the right to inquire into the whole case."

The syllabus as found in the official reports reads:

> "The decision of the Secretary of Commerce and Labor in proceedings to deport an alien under the Immigration Act is not final; but the Court on habeas corpus may inquire into the whole case."

Other cases, also, have recognized indirectly that the rule is confined to exclusion cases.

The Secretary's decision not being made final, and there being no appeal or other method of review provided by law, the only possible way in which the personal liberty of the alien may be secured is by the writ of habeas corpus. And to deny him the right to that writ would trench dangerously close upon the provision of the Constitution which declares that:

> "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Yet if the government's contention in the present instance is to be upheld, the privilege of the writ is to be, not only suspended, but absolutely destroyed.

V.

The Warrants of Deportation, Issued by the Secretary of Labor in the Present Cases, are Void in That They do not State a Cause for Expulsion Under the Immigration Law.

This point is materially different from the question of the Secretary's jurisdiction to review the decisions of officials in the Philippines under the cloak of deportation warrants.

We have seen that exclusion and expulsion are distinct entities in law. It follows that the causes for each are equally separate and distinct and not interchangeable, and unless the causes for exclusion are, in so many words or by necessary construction, made causes for expulsion, they do not exist as such.

The causes for expulsion and the persons affected thereby are divided by law (Secs. 20 and 21 of the Act) into three groups, as follows:

(1) Those who have entered the United States in violation of law;

(2) Those who have become public charges within a limited period from causes existing prior to landing, and

(3) Those found in the United States in violation of law.

This grouping of "expellables" is not only upheld by our interpretation of the statute, but is in direct and complete accord with the Department's classification, as set forth in its official publication, "Immigration Laws". The footnote to Immigration Rule 22 (Arrest and Deportation on Warrant) found on page 37 of the pamphlet, reads:

> "This rule aplies to the following classes of aliens: (1) Those who have entered the United States in violation of law; (2) Those who have become public charges from causes existing prior to landing; (3) Those 'deemed to be unlawfully within the United States' under Sec. 18 and Sec. 3. Class (1) includes all aliens who at the time of entry belonged to any of the

> classes enumerated in Sec. 2 or Executive Order of March 14, 1907 (Rule 11), and who should therefore have been excluded at that time; also aliens who enter contrary to the terms of Sec. 36 and Rules 12 and 13. As to class (2): Usual instances in which an alien becomes a public charge are where he enters a public almshouse or hospital or is sent to jail. What may be a 'cause existing prior to landing' depends somewhat on the circumstances of each case. In actual practice such cause is usually a physical or mental defect, to be proved in subdivision 3 of this rule."

The Court will note that the Department's ruling limits membership in Class 3 to those "deemed to be unlawfully in the United States" under Sections 3 and 18, and specifically provides that "membership in the excluded classes at time of entry" brings an alien within Class 1 (those unlawfully entering) and not within Class 3 (those unlawfully present).

Under this interpretation, the charge in the warrant that the "aliens are found in the United States in violation of the Act" and the specification "in that they are members of the excluded classes" are fatally inconsistent; the charge being that the aliens are members of Class 3, and the specification, according to the Department's own ruling, placing them in Class 1.

But aside from merely technical objections, it is obvious that these persons are not members of Group (class) 1, since they did not enter unlawfully, but were duly and regularly admitted by

authorized officials, and no fraud in connection therewith is so much as hinted, much less alleged.

Neither do they belong within Group (class) 2, since they are not public charges.

If amenable to expulsion at all, then, these persons must be within Class 3, those present in violation of law. That such is not the case is conclusive for three reasons.

A.

The provision that aliens who *have become* public charges shall be expelled necessarily excludes mere *liability to become* such as a ground for expulsion.

It must be conceded that one who has actually become a public charge was, at the time he landed, one of the class who were liable to become such. And this "liability" has been conclusively proven by subsequent events.

The law, then, by providing that certain of this class (those who *have become* public charges) shall be expelled, has by necessary construction exempted from expulsion those who are now thought to be *liable* only. "The expression of the one is the exclusion of the others."

B.

An examination of Section 2 of the Act shows that the causes for exclusion, with a single exception, are matters of "fact". The exception is "likely to become public charges" and that is a matter of "opinion", the law vesting the right to

form that opinion in the examining Inspector or the Board.

It has been held that a fact, to be a cause for exclusion must be a "present existing fact at time of entry".

Ex parte Watchorn, 160 Fed. 1014;
Ex parte, Koerner, 176 Fed. 478.

It follows that an "opinion" to be a cause for exclusion must likewise be a present existing opinion at time of entry. And obviously a *subsequent* opinion, or a change of opinion by the same officer, would not operate to bring these aliens within membership in the excluded classes, much less a different opinion subsequently held by officials who had no jurisdiction to decide the question originally.

C.

As has been said already "public charges from causes existing prior to landing" were indisputably at the time of such landing "persons liable to become public charges", and as such were undeniably members of the excluded classes.

If the government's present contention, to wit, that members of the excluded classes may be expelled as present in violation of law, were correct, these public charges might be expelled as "found here in violation of law".

That such is not the law is obvious from the fact that Congress considered it necessary to provide for their expulsion as a separate and distinct class.

In the briefs in the Court below, much was made of the specification in the warrants that certain aliens at time of entry were "afflicted with uncinariasis (hookworm) a dangerous contagious disease".

From a legal standpoint, as a cause for exclusion, a "dangerous contagious disease" stands on precisely the same plane with "likely to become a public charge", and what has been said as to the latter applies, with some slight modification, to the former.

Without asking this Court to go into the merits of this question, it may be remarked that, as the transcript shows (pp. 51, 53, 57), the sole evidence of disease is a certificate that at the time of reaching San Francisco, a year or two after entry, the men were diseased. Against this were placed in evidence two certificates that they were not diseased, one dated prior and one subsequnt to landing at Manila; also the presumption that they were examined and found free from disease by immigration doctors at the time of entry, as required by law. And this was one of the matters appellant sought to have reviewed.

We believe that it has been conclusively shown that the Court below was in error in holding

(1) That an alien admitted at Philippine ports is admitted to only a limited portion of the territory of the United States;

(2) That aliens, coming from the islands, may be excluded from the mainland as though coming from abroad;

(3) That there is no material difference between exclusion and expulsion, and

(4) That the federal courts may not examine into the merits of expulsion cases upon habeas corpus.

Because of these errors we believe the judgment denying the writs must be reversed.

Dated, San Francisco,
February 19, 1915.

Respectfully submitted,

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Appellant.

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